No. 92-1550

In the Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board has authority to remedy an unfair labor practice by ordering an employee's reinstatement with backpay, even though the employee purposefully testified falsely during the administrative hearing.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A20, is reported at 982 F.2d 441. The decision and order of the National Labor Relations Board (Board), Pet. App. B1-B28, including the decision and recommended order of the administrative law judge, Pet. App. B29-B68, is reported at 304 N.L.R.B. 585.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1992. The petition for a writ of certiorari was filed on March 24, 1993, and was

granted on June 14, 1993, limited to the third question presented by the petition. J.A. 35. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a trucking terminal in Albuquerque, New Mexico. Pet. App. A7. Petitioner employs both regular and casual dockworkers at that facility. *Ibid.* In April 1988, petitioner negotiated a supplemental labor agreement with the Union [1] that created a new "preferential casual" dockworker classification with certain seniority rights. *Id.* at B4, B6. On June 20, based on its interpretation of the agreement, petitioner discharged twelve casual dockworkers, including employee Michael Manso. On June 29, petitioner offered to reinstate those who agreed to waive their right to placement on the "preferential casual" list. *Id.* at B7, B13.

The Union filed a grievance on behalf of the dischargees, and Manso filed an unfair labor practice charge with the Board against petitioner. Pet. App. B8, B30 n.1. On April 6, 1989, a grievance panel ordered petitioner to offer the discharged employees reinstatement as preferential casuals but denied all monetary claims. *Id.* at B9-B10. When Manso returned to work, three of petitioner's operations supervisors warned him that petitioner intended to retaliate against him. Chris Lovato warned Manso that he should watch his step because petitioner was "gunning" for him. Pet. App. B46; J.A. 96. Thomas McNutt assured Manso that he was not responsible

[1] Petitioner's employees were represented by Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union).

for Manso's discharge and warned Manso to be careful because "the higher echelon was after [him]." Pet. App. B46; J.A. 96-97. Kyle Beeson said to Manso, "Well, it looks like you made it back. Let's see how long it takes them to get rid of you this time." Pet. App. B46; J.A. 98-99.[2]

On June 19, less than two months after his return, petitioner discharged Manso, ostensibly for a second failure to respond to a work call. Pet. App. B15.[3] Manso filed a grievance, and a grievance panel ordered petitioner to reinstate him without backpay. *Id.* at B47.

Manso again returned to work. On August 11, 1989, he reported for his shift four minutes late and received a written warning. Pet. App. B47. At that time, petitioner had no specific lateness policy applicable to preferential casuals. After Manso re-

[2] In the administrative hearing, Lavato (J.A. 91-92), McNutt (J.A. 118) and Beeson (J.A. 56) denied that they had made those statements. The administrative law judge, however, credited Manso's testimony on this matter. Pet. App. B46.

[3] Petitioner's policy was that preferential casuals were required to be available by phone before a shift, in case they were called in to work. Should they be needed, a regular dockworker would dial the employee's number; if no one answered, the dockworker would verify that fact. Pet. App. B51. On May 6, Manso failed to respond to a phone call summoning him to work, and petitioner issued him a written warning. On June 19, supervisor Ronald Ford asked Jeff Motter, a regular dockworker, to summon Manso for work on the 8:30 a.m. shift. Motter placed a telephone call and recevied no answer. Motter told Ford he might have misdialed Manso's number, but Ford refused permission to redial and insisted that Motter sign a form verifying that he had placed the call. Pet. App. B47.

ported late on August 11, however, petitioner decided that preferential casuals (although not other employees) would be discharged if they were late twice without good cause. *Id.* at B16-B17; J.A. 69, 78-79.

About 5:25 a.m. on August 17, Manso telephoned petitioner and explained that he would be late for his 5:00 a.m. shift because he had experienced car trouble on the way to work. When Manso arrived at work at approximately 5:50 a.m., petitioner's officials asked him why he was late. Manso said that his car broke down on the highway; that he had abandoned the car, walked to a pay phone at a gas station, and, after phoning petitioner, called his wife to pick him up and drive him to work; and that when his wife arrived, he began driving to the terminal with her, but was stopped by a police officer for speeding. Pet. App. B58; J.A. 104-106.

Because petitioner's officials doubted Manso's explanation, they investigated it. Pet. App. B58; J.A. 72. Terminal manager Mike Long was unable to find the car Manso claimed he had abandoned on the highway. Operations manager Ed Fultz learned that police officer Derryl Smith had stopped Manso because he was speeding, not to assist him with his car trouble. J.A. 73-74. Petitioner then discharged Manso, ostensibly pursuant to its policy requiring discharge after two incidents of tardiness without legitimate excuse. Pet. App. B16, B48; J.A. 76. Petitioner did not confront Manso with its suspicion that he was lying, because it terminated him for "tardiness." Pet. App. B16; J.A. 87-88.

Manso filed a grievance, but did not pursue it after the first-step grievance committee upheld the discharge. Pet. App. B48. Thereafter, he filed a second

unfair labor practice charge with the Board against petitioner. *Id.* at B30 n.1.

2. The administrative law judge (ALJ) concluded that the statements made to Manso by supervisors McNutt, Lavato, and Beeson when he returned to work after his first discharge violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), because they threatened future retaliation for his protected activity of filing a grievance and an unfair labor practice charge.[4] The ALJ also concluded that petitioner's discharge of Manso in June 1989 violated Section 8(a)(1), (3), and (4) of the Act,[5] because petitioner fired him in retaliation for participating in the grievance filed by the Union regarding petitioner's termination of the casual dockworkers in June 1988, and for filing a charge with the Board in connection with the incident. Pet. App. B15, B57-B58. The ALJ explained that the circumstances of the discharge showed "a motive directed not toward filling out [petitioner's] complement of employees for the morning shift but of arming itself with a justification for discharging an unwanted employee." *Id.* at B58.

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[4] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

[5] Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act.

The ALJ found, however, that "Manso was lying to [petitioner] when he reported that his car had overheated and that he was late for work because of car trouble." Pet. App. B59.[6] The ALJ concluded that petitioner had discharged Manso on August 17 for cause, rather than for activities protected by the Act. *Ibid.*

3. The Board agreed with the ALJ that petitioner's June discharge of Manso was unlawful. Disagreeing with the ALJ, however, the Board found that the August 17 discharge also violated Section 8(a)(1), (3) and (4) of the Act. Pet. App. B21. The Board determined that the supervisors' threats of retaliation and Manso's subsequent unlawful discharge in June provided "strong evidence" of an unlawful motivation for the August discharge. *Id.* at B18. The Board further determined that the ALJ's conclusion that petitioner lawfully fired Manso because Manso lied about his reason for being late on August 17 was premised on "a plainly erroneous factual statement of [petitioner's] asserted reasons" for the discharge. *Ibid.* The testimony of petitioner's operations manager, Ed Fultz, who signed the discharge letter, made it clear that Manso was not fired for dishonesty; rather, Manso's lie established only that he did not have a legitimate excuse for being late and he was thus subject to discharge under the newly instituted policy that two incidents of unex-

[6] The ALJ relied on the branch manager's inability to locate Manso's abandoned car and the testimony of officer Smith that "there was no one in the car with Manso when [the officer] stopped to give Manso a warning for excessive speed." Pet. App. B58-B59; J.A. 126.

cused lateness were grounds for discharge. Pet. App. B16; J.A. 87-88.[7]

Noting that petitioner had employed a novel retroactive application of its lateness policy in discharging Manso, Pet. App. B20,[8] the Board concluded that petitioner had seized on Manso's second tardiness on August 17 "as a pretext to discharge him again and for the same unlawful reasons it discharged him" in June. *Id.* at B21. Accordingly, the Board ordered petitioner to cease and desist from its unfair labor practices, to make Manso whole for any loss of earnings and benefits suffered as a result of his August 17, 1989 discharge, and to offer him immediate reinstatement as a preferential casual dockworker.[9] *Ibid.*

[7] The Board acknowledged that "giving dishonest excuses for lateness" could constitute good cause for employee discharge. Pet. App. B18 n.13. The Board observed, however, that "[petitioner] provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action." *Id.* at B18.

[8] The Board observed that petitioner had not established its lateness policy until after Manso's first infraction on August 11, but applied that policy retroactively to discharge him on the basis of the August 11 and August 17 episodes. Pet. App. B20. By contrast, petitioner did not apply its policy about failure to respond to work calls to events occurring before it had adopted the policy. *Ibid.*

[9] Petitioner made a brief challenge to that remedy, asserting it would violate public policy and "undermine legal process" for the Board to grant relief to a charging party who was untruthful. J.A. 31. In several previous cases, the Board had indicated that it did not regard lack of truthfulness as a per se bar to make-whole relief, see, *e.g.*, *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), enforced mem., 872 F.2d 413 (3d Cir. 1989), and the Board did not specifically respond to petitioner's contention here. See also notes 13-14, *infra*.

4. The court of appeals affirmed the Board's finding that petitioner fired Manso in August 1989 in retaliation for his protected activities, and not for cause. Pet. App. A18. Reviewing the record under the framework approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the court of appeals held that there was "abundant evidence of antiunion animus in [petitioner's] conduct towards Manso," Pet. App. A16, and petitioner did not show that it would have discharged him in the absence of his protected activity. *Id.* at A18.

The court of appeals also rejected petitioner's assertion that, because Manso lied to petitioner about the reason for his tardiness on August 17, 1989, and repeated that story during his testimony before the ALJ in the unfair labor practice proceeding, the Board was barred from ordering his reinstatement with backpay. Pet. App. A18-A19. The court noted that the Board has "wide discretion in assessing whether, in its judgment, a particular remedy will effectuate the policies of the Act," and held that the Board did not abuse its discretion in deciding that Manso's conduct "did not rise to the level of misconduct requiring that reinstatement should be denied." *Id.* at A19. The court noted that "Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." *Ibid.* Accordingly, the court enforced the Board's order requiring petitioner to reinstate Manso with backpay. *Id.* at A14, A20.

SUMMARY OF ARGUMENT

The issue in this case is a narrow one: whether the Board must deny reinstatement with backpay as relief for an unfair labor practice whenever the discharged employee has testified falsely during a Board hearing. While rejecting such a per se rule, the Board does not mandate reinstatement regardless of how abusive of the Board's processes the employee has been. Rather, the Board has adopted a middle ground that takes into account the need to redress unfair labor practices as well as the need to protect the agency and the employer's interests. The Board's rule is a reasonable one that is entitled to deference from the courts.

A. Under Section 10(c) of the Act, the Board has authority to remedy unfair labor practices with "such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. 160(c). In devising remedies, the Board has considerable discretion, subject only to limited judicial review. A court may set aside the Board's remedial order only when "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

Reinstatement with backpay—make-whole relief—is the Board's traditional remedy for an unlawful termination of employment. That remedy not only restores the employee to the position he should have occupied, but dispels the effect of the unfair labor practice on the exercise of rights by other employees. The Board has discretion, however, to withhold that remedy when its beneficiary has abused the administrative process.

B. The Board has determined that when an employee has given false testimony in support of a claim before the Board, the employee does not automatically forfeit make-whole relief. If an employee has generally been trustworthy in testimony, and has not engaged in wholesale abuse, it is unnecessary to withhold reinstatement with backpay to vindicate the integrity of the Board's processes. Where, however, the abuse is more serious, backpay may be forfeited from the time of the misconduct. And where the employer shows that the misconduct has rendered the employee unfit for further employment, reinstatement is forfeited as well.

In contrast to the per se rule advanced by petitioner, the Board's rule permits it to take account of the specific circumstances of a case. The Board is thereby able to frame a make-whole remedy calculated to neutralize an employer's unfair labor practice in the most effective way, absent a demonstrated need to sacrifice that end in the interest of the integrity of the Board's processes or the employer's business needs.

C. The Board's rule is within the scope of its authority. The rule aims at redressing the effects of a proven unfair labor practice and therefore is legitimate under *Virginia Elec. & Power Co.*

The need to uphold the integrity of the Board's proceedings does not compel a per se rule denying make-whole relief for an employee who testifies falsely to the Board. No provision of the Act mandates that result. Even if a comparable rule prevailed at common law or in other tribunals, the Board would be free to depart from it in order to achieve the purposes of the Act. Moreover, the Board does not ignore perjury; it can refer suspected cases for criminal prosecution. A per se rule, however, would

require the Board to apply a selective penalty to untruthful employees, while failing to apply similar remedies to untruthful employers who violate the Act.

The possibility of alternative remedies for unfair labor practices does not require the Board to withhold make-whole relief as a sanction for employee perjury. Remedies such as cease-and-desist orders, notice-posting, and contempt proceedings serve valuable purposes. They are less effective than reinstatement, however, in restoring the status quo ante or telling the rest of the workforce that their employer may not retaliate against protected activity with impunity.

Finally, the Board's rule is not incompatible with the employer's legitimate interest in keeping dishonest employees off the workforce. Nothing in the Board's rule prevents an employer from terminating an employee for dishonesty. But when an employer terminates an employee out of anti-union animus, the Board has latitude to frame an appropriate remedy. The Board permits the employer to avoid reinstatement if it can establish that the employee's lie renders him unfit for service or that his return would jeopardize company efficiency. Here, no such showing has been attempted. And as in many cases involving relatively mild infractions, it is unlikely that any such showing could be made. In view of the Board's mandate to grant effective remedies for unfair labor practices, the Board's approach is within its sound discretion.

ARGUMENT

THE BOARD MAY ORDER REINSTATEMENT WITH BACKPAY OF AN EMPLOYEE TO REDRESS AN UNFAIR LABOR PRACTICE, EVEN THOUGH THE EMPLOYEE LIED DURING THE ADMINISTRATIVE HEARING

Petitioner requests this Court to mandate that an employee who lies during an administrative hearing automatically forfeits the right to reinstatement with backpay as a remedy for the employer's unfair labor practice. Nothing in the Act supports the imposition of such a per se rule on the Board. Exercising its authority under the Act to remedy violations, the Board has balanced the competing policy interests and has determined that a discriminatee who makes false statements at a Board hearing may, but does not automatically, forfeit his or her right to reinstatement and backpay. The Board's approach is a reasonable one and is entitled to deference from the courts.

A. The Board Has Remedial Discretion To Require An Employee's Reinstatement With Backpay As A Means Of Effectuating The Public Policies Of The Act

Section 10(c) of the Act empowers the Board to remedy an unfair labor practice by requiring a person who has violated the Act to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. 160(c). In remedying unlawful employer discrimination, the Board does not vindicate "private rights," but acts "in a public capacity to give effect to the declared public policy of the Act" to encourage collective bargaining

and to protect the right of workers to organize. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 193 (1941) (internal quotation marks omitted); *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 543 (1943).

This Court has "accorded the Board considerable authority to structure its remedial orders to effect the purpose of the [Act] and to order the relief it deems appropriate." *Litton Financial Printing Division* v. *NLRB*, 111 S. Ct. 2215, 2223 (1991); *Shepard* v. *NLRB*, 459 U.S. 344, 349 (1983); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347 (1953). "The particular means by which the effects of unfair labor practices are to be expunged are matters for the Board not the courts to determine." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 539 (internal quotation marks omitted); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 899 (1984) (courts "should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices"); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 346, 348. That principle of deference is given substance through the requirement that a court may reject the Board's remedy only when "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 540; *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 347; cf. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In granting relief for an unlawful termination of employment, the Board's normal remedy is re-

instatement with backpay. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 187. Such make-whole relief prevents the employer's "enjoyment of any advantage which he has gained by violation of the Act," *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 364 (1940), and thereby permits "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge*, 313 U.S. at 194. Reinstatement and backpay do not serve only as "protection for the victimized employee"; they also serve the more important objective of "[a]voidance of labor strife [and] prevention of a deterrent effect on the exercise of rights guaranteed employees by [Section] 7 of the Act." *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 185 (1973).

The Board long ago explained the direct connection between reinstatement orders and the advancement of the overall goals of the Act. In *Phelps Dodge Corp.*, 35 N.L.R.B. 418 (1941), the Board determined that reinstatement was warranted even though the particular employees discharged had obtained equivalent employment elsewhere. The Board explained that its order was necessary to remove the effects of an unlawful discharge on the remainder of the work force. "The Act postulates, and the fact is readily verified by common experience, that anti-union discrimination exercises a coercive effect not only upon the immediate victim, but upon all present or future employees of the particular employer; it impresses upon them the danger to their welfare and security associated with membership in or activity on behalf of a labor organization." *Id.* at 420 (internal quotation marks omitted). "Accordingly,"

the Board noted, "the purpose of the order to offer reinstatement is not only to restore the victim of discrimination to the position from which he was unlawfully excluded, but also, and more significantly, to dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination." *Ibid.* (internal quotation marks omitted).

This Court echoed that justification in upholding a Board order requiring a successor employer to reinstate employees with backpay as a remedy for discriminatory discharges by the predecessor employer. See *Golden State Bottling*, *supra*. The Court explained that, "[t]o the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action." 414 U.S. at 184. And, if the employees "do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities" and "a leadership vacuum in the bargaining unit." *Id.* at 184-185.

Although it often serves paramount public purposes, reinstatement with backpay is not an automatic remedy. Where the charging party has engaged in misconduct, the Board "may decline to be imposed upon or to submit its process to abuse." *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18-19 (1943) (Board may dismiss a complaint if it is related to a scheme of violence to coerce illegal aims). It is the task of the Board to reconcile the goals of protecting the integrity of its processes, on the one

hand, and effectuating the public purposes of the Act, on the other.

B. The Board Has Balanced The Competing Interests In Determining That An Employee Who Testifies Falsely At An Administrative Hearing Does Not Automatically Forfeit Make-Whole Relief

In determining whether, and to what extent, to withhold the remedy of reinstatement and backpay from a discriminatee who has lied in a Board proceeding, the Board has considered the need to deter conduct abusive of the Board's processes and the need to remedy the consequences of unfair labor practices. The Board's approach to the issue of false testimony by a charging party rejects a per se rule in favor of a more balanced analysis, and the facts of this case illustrate the appropriateness of that approach.

1. When faced with misconduct by charging parties in Board proceedings, the Board attempts to tailor its remedies to the magnitude of the transgression. The Board's rule in the area of concealment of earnings during back-pay proceedings illustrates that approach. In *American Navigation Co.*, 268 N.L.R.B. 426 (1983), the Board ruled that "discriminatees found to have willfully concealed from the Board their interim employment will be denied backpay for all quarters in which they engaged in the employment so concealed." *Id.* at 427. The Board reasoned that, although "to award full backpay to a claimant who attempts to pervert an order issued in the public interest into a scheme for unjustified personal gain is to reward perfidy," to deny more backpay than is necessary to deter deception is "to provide a respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct

for no useful purpose." *Id.* at 428. The Board concluded that a remedy that denies backpay for the quarters in which concealed employment occurred "will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices." *Ibid.*[10]

The Board's approach when a discriminatee makes false statements at a Board hearing or otherwise interferes with the integrity of the Board's processes similarly reflects a balancing of interests. In *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), enforced mem., 872 F.2d 413 (3d Cir. 1989), the Board awarded reinstatement with backpay to an employee who gave false testimony at the unfair labor practice hearing. In concluding that it would not effectuate the policies of the Act to deny the employee a full remedy, the Board noted that the ALJ had not found her to be a generally untrustworthy witness, but had credited the "major portion" of her testimony and relied on it in finding that her employer violated the Act in discharging her. 290 N.L.R.B. at 1193. With respect to reinstatement, the Board noted that

[10] The Board thus overruled its prior approach that denied backpay only as to specific amounts of concealed earnings. *American Navigation Co.*, 268 N.L.R.B. at 427. The Board reaffirmed, however, its decisions in *M.J. McCarthy Motor Sales Co.*, 147 N.L.R.B. 605 (1964), and *Great Plains Beef Co.*, 255 N.L.R.B. 1410 (1981), under which claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception are denied all backpay. *American Navigation Co.*, 268 N.L.R.B. at 428 n.6.

> [w]hen seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.

Id. at 1193, 1194 n.5 (internal quotation marks omitted). In *Owens Illinois*, the respondent had "completely failed to meet its burden of establishing that [the discriminatee] is unfit for further employment," *id.* at 1193, because it did not introduce evidence "to establish that [the discriminatee's] false testimony would have any impact on her performance if reinstated." *Id.* at 1194.[11]

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[11] The Board's analysis in *Owens Illinois* was foreshadowed to some extent by earlier cases. While in *O'Donnell's Sea Grill*, 55 N.L.R.B. 828 (1944), the Board stated, without further explanation, that an employee's "record of absenteeism combined with his lack of candor on the witness stand, was such that, upon the entire record, we do not believe that his reinstatement would effectuate the policies of the Act," in *Clayton E. Smith*, 126 N.L.R.B. 1325, 1326 (1960), the Board granted relief despite the fact that an employee tried to withdraw his charges and claimed they were false; while recognizing that this impeded the Board's investigation, the Board saw the employee's intent to curry favor with the former employer as a mitigating factor. Later, in *D.V. Copying & Printing, Inc.*, 240 N.L.R.B. 1276 (1979), the Board explained that suborning perjury at a Board hearing warranted the withholding of make-whole relief from the time of the misconduct, because suborning perjury "constitutes deliberate and malicious conduct * * * calculated to abuse and undermine

Lear-Siegler Management Service Corp., 306 N.L.R.B. 393 (1992), illustrates the application of these principles. There, the Board denied reinstatement and tolled the amount of backpay due a discriminatee who interfered with the Board's processes by attempting to influence and manipulate a witness.[12] The Board held that a discriminatee who so interferes with the Board's processes forfeits his or her right to backpay beyond the date of the impermissible interference. The Board explained:

> [T]his remedy strikes a balance between the competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices. Denying backpay after the date of the threat protects the integrity of the Board's processes by providing that those who abuse the process cannot turn

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Board processes." *Id.* at 1276 n.1. And in *Service Garage, Inc.*, 256 N.L.R.B. 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982), an employee who was younger than the minimum age required by his present employer overstated his age in testimony; the Board indicated that the employee's lie did not "amount to a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act," since the lie "did not go to the heart or even to the periphery of the Board's processes" and was not intended to undermine, nor did undermine, the Board's proceedings. 256 N.L.R.B. at 931.

[12] The discriminatee believed that a witness planned to testify favorably to him at the Board hearing. When the discriminatee later heard a rumor that the witness was in fact going to testify unfavorably to him (testimony that the discriminatee believed to be untruthful), he threatened the witness that he would report an alleged violation of the witness's probation if the witness changed his anticipated testimony. *Lear-Siegler*, 306 N.L.R.B. at 403-404.

around and use the process to reap a full remedy. Granting backpay until that date also ensures that a respondent's unlawful discrimination does not go unremedied.

306 N.L.R.B. at 394 (footnote omitted).

The Board also held in *Lear-Siegler* that the discriminatee's interference with the Board's processes, though sufficient to warrant tolling of his right to backpay, did not, standing alone, warrant forfeiture of his right to reinstatement. 306 N.L.R.B. at 394. The critical inquiry respecting reinstatement "concern[s] [the discriminatee's] fitness for return to the workplace." *Ibid.* On the facts presented, the Board found the discriminatee unfit for further employment because his "blatant threat of specific consequences to [the witness's] well-being * * * was of a nature likely to produce in [the witness] a continuing fear that any workplace disputes with [the discriminatee] might result in a revival and possible implementation of the threat." *Ibid.*

2. Petitioner does not claim that, under the Board's approach in *Owens Illinois* and *Lear-Siegler*, Manso's untruthfulness warranted the denial of reinstatement and backpay. Rather, petitioner argues (Br. 7-8, 35-36) for a blanket rule that would deny make-whole relief to any employee who was untruthful.[13] As the facts of this case indicate, the Board's

[13] At the administrative level, petitioner's objection to relief in favor of Manso was so cursory that the Board may well have elected to disregard it. The Board's rules require specificity in raising an exception, as well as citation of supporting authority, 29 C.F.R. 102.46(b)(1). They further provide that "[a]ny exception which fails to comply with the foregoing requirements may be disregarded." 29 C.F.R. 102.46(b)(2). Petitioner argued only that "[t]he Act does not reward perjury and a decision allowing Charging Party to benefit by his inveracity to ABF and the Board would undermine legal process," while citing no supporting authority. J.A. 31. That assertion was contrary to *Owens Illinois*, and the Board may well have viewed it as requiring no response.

more balanced approach permits it to consider relevant circumstances that bear on the appropriateness of make-whole relief, which petitioner's rule would require the Board to ignore.[14]

In determining whether to award backpay, the Board looks to the employee's overall veracity, not simply to the portion of his testimony that was false. Manso was not a witness totally unworthy of belief. The ALJ credited his testimony in all respects other than that concerning his reason for being late on August 17; indeed, the ALJ credited Manso's testimony over that of petitioner's supervisors in finding that they had threatened future retaliation against Manso for his protected activities (see note 2, *supra*). Moreover, in explaining his lateness to petitioner, Manso did not lie about the reason for being late for a malicious purpose, but to protect himself from a *second* discharge under a policy that he believed, and the Board subsequently found, was being applied to

[14] At this juncture, petitioner has waived any claim that Manso should have been denied relief under the Board's approach. Petitioner did not raise that contention before the Board, and under Section 10(e) of the Act, 29 U.S.C. 160(e), "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). Moreover, petitioner did not make such a claim in the court of appeals, nor does it make that claim in this Court.

him because he had filed unfair labor practice charges and grievances. While Manso repeated his lie to the ALJ, his lie did not influence the Board's unfair labor practice determination.[15] The Board found that petitioner discharged Manso not for lying, or even for being tardy twice without a sufficient excuse, but as a reprisal for his having engaged in protected activities. Petitioner's lie was thus not part of a whole scheme that subverted the Board's processes.[16]

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[15] It is true that Manso could have explained the reason for his fabrication to the ALJ, rather than persist in the fabrication. Despite his failure to do so, however, the Board reasonably could consider the impetus for Manso's initial fabrication to be a mitigating factor. When Manso gave his false testimony, he had already suffered three discharges (in June 1988, June 1989, and August 1989), which either the ALJ or the Board (or both) found were unlawful. A lie uttered by an employee trapped in those somewhat unusual circumstances may reasonably be characterized as less deserving of sanction than a lie given by an employee who has not endured a similar history of mistreatment by the employer. And the employee's adherence to his story before the ALJ, though unjustifiable, is understandable.

[16] Amicus American Trucking Association (ATA) relies Br. 8-9) on the definition of "materiality" under the federal perjury statute to argue that Manso's fabrication was material because it had the potential to influence the Board's decision. In exercising its remedial discretion, however, the Board is not bound by the definition of materiality in a criminal proceeding. It is well within the Board's discretion to withhold the harsh sanction of denial of make-whole relief when the fabrication was irrelevant to its determination. See *Service Garage, Inc.*, 256 N.L.R.B. 931, 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982); cf. *J.P. Stevens & Co.* v. *NLRB*, 638 F.2d 676, 688-689 (4th Cir. 1980) (count declined to disturb ALJ's conclusion that the

In determining whether to grant reinstatement, the Board focuses on the employee's fitness to return to the workplace. The employer has the burden to establish that the employee is unfit for further employment, and "speculation" that the employee is unfit because he testified falsely is insufficient. *Owens Illinois*, 290 N.L.R.B. at 1193. Here, there is no concrete showing that petitioner's conduct at the hearing rendered him unfit for further employment as a dockworker. Manso's lie concerned his actions off the job and was not directly related to the conduct of petitioner's business. It did not misrepresent anything that occurred at the employer's premises or during the course of work. Moreover, petitioner's "officials who testified were also discredited by the judge * * * and there is no indication [that the employer] took any action whatsoever against those officials."[17] *Id.* at

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employee's "dissembling [was not] sufficiently egregious to deny him an otherwise proper remedy"). Cf. *Indian Head Lubricants, Inc.* 261 N.L.R.B. 12 (1982) (reinstatement denied to unlawfully discharged employee whose bribery scheme was a "flagrant and malicious" subversion of a Board election).

[17] Amici Chamber of Commerce *et al.* (Chamber) are thus quite wrong in arguing (Br. 13) that "it would be impossible for ABF or any employer to accept an employee like Manso back into the workplace." It is not uncommon for arbitrators to order reinstatement of an employee who has engaged in deception, when, on balance, that remedy appears appropriate. *Union Carbide Corp.*, 81 Lab. Arb. (BNA) 864 (1983) (White, Arb.) (awarding reinstatement without backpay to employee who gave supervisor false reason to justify use of funeral leave); *George A. Hormel & Co.*, 71 Lab. Arb. (BNA) 1090 (1978) (Wyman, Arb.) (reinstating without backpay employee who proffered false reason for absence from work); *Air Canada*, 66 Lab. Arb. (BNA) 1295 (1976) (O'Shea, Arb.) (reinstating with backpay and suspending for one month employee for fraudulent abuse of sick leave).

1194. Cf. *NLRB* v. *O'Hare-Midway Limousine Service, Inc.*, 924 F.2d 692, 697-698 (7th Cir. 1991) (employer failed to show that it had a safety policy that precluded reinstatement of driver with drunk driving citation); *NLRB* v. *Jacob E. Decker & Sons*, 636 F.2d 129, 131-132 (5th Cir. 1981) (post-discharge felony convictions do not, without more, preclude reinstatement where employer had no policy of automatic discharge of felons). While dishonesty is, of course, a valid basis for discharging an employee, that was not the basis that petitioner invoked for discharging Manso and there is no showing that it is a basis for discharge that petitioner uniformly applies to its employees.

The Board's approach permits it to consider all of those circumstances in determining how to craft a remedy that "will effectuate the policies of th[e] [Act]," 29 U.S.C. 160(c). It permits the Board to neutralize the effects of an unlawful termination through the most effective means where there is no need to subordinate that purpose to the protection of the Board's integrity or the employer's legitimate interests. Petitioner's rigid approach, in contrast, would deny the Board any discretion to consider whether reinstatement with backpay is appropriate once it determines that the employee has lied.

C. The Board's Rule Is Within The Scope Of Its Authority

In arguing that the Board is required to deny make-whole relief to employees who have testified falsely to the Board, petitioner's burden is to establish that such relief constitutes "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 540. Petitioner

has not made that difficult showing. Make-whole relief in this context serves the traditional purposes that it has in its other applications by the Board, and no policy expressed in the Act requires a per se rule denying such relief because of the employee's false testimony.

1. Petitioner contends that its rule is necessary "[t]o maintain the integrity of the oath administered at NLRB hearings" (Br. 30), and, more generally, to maintain the "integrity of the [Act] and its adjudicatory system" (Br. 3). The Board, however, has discretion in determining how best to protect its integrity while effectuating the policies of the Act. There is no express provision of the statute requiring denial of relief to a charging party who lies under oath before the Board. Petitioner relies (Br. 10) on Rule 603 of the Federal Rules of Evidence, which requires that a witness shall take an oath to testify truthfully, and the requirement of Section 10(b) of the Act, 29 U.S.C. 160(b), that the Board must follow the rules of evidence applicable in the federal district courts "so far as practicable." But Fed. R. Evid. 603 does not prescribe the consequences for failing to testify truthfully. The National Labor Relations Act "is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2754 (1993) (discussing Title VII of the Civil Rights Act of 1964).

Asserting that reinstatement is an "equitable" remedy, petitioner invokes the equitable maxim that "a man must come into a court of equity with clean hands" (Pet. Br. 13) as a basis for denying relief to employees who commit perjury. The Board, however, is not a court of equity, and is not bound to apply rules developed in other contexts in implementing the

statutory commands of the Act. *Virginia Elec. & Power Co.*, 319 U.S. at 543 (court may not "fetter the Board's discretion by compelling it to observe conventional common law or chancery principles"); *Phelps Dodge Corp.*, 313 U.S. at 188 (Board is not "confined within narrow canons for equitable relief deemed suitable by chancellors"); see also *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983). Nor is the Board bound to follow the practices of courts and arbitrators addressing other statutes or claims (Pet. Br. 17 n.9, 34-36), even if it were true that such bodies automatically nonsuit a plaintiff who commits perjury—which it is not.[18] Although perjury "has been prohibited since early days of the common law and is a felony," while the unfair labor practice that petitioner committed "was permissible until relatively recently in American history" (Pet. Br. 14), the

[18] In fact, neither courts nor arbitrators follow a reflexive rule. While courts may invoke the sanction of dismissal in the face of deceptive conduct, they are not required to apply the ultimate penalty; this Court has cautioned that "outright dismissal of a lawsuit * * * is a particularly severe sanction." *Chambers* v. *NASCO, Inc.*, 111 S. Ct. 2123, 2133 (1991). And arbitrators typically exhibit the same flexibility displayed by the Board. Arbitrators have held that post-discharge events cannot be invoked to justify the discharge, but rather, "in considering the matters of reinstatement and back pay, account may and should be taken of the employee's actions subsequent to his discharge insofar as they may relate to his fitness for employment and as they bear upon the effect of his reinstatement on plant morale, discipline, efficiency, and the like." *Columbus Show Case Co.*, 44 Lab. Arb. (BNA) 507, 514 (1965) (Kates, Arb.). See also *Southern Bell Telephone & Telegraph Co.*, 25 Lab. Arb. (BNA) 270, 276-277 (1955) (McCoy, Arb.) ("real question" is whether employee's conduct "had been such as to show that he was not a fit person to be reinstated to his job at the end of the strike").

Board's mission is to implement the Act, not to punish common law crimes.

The Board, of course, regards perjury as a serious matter. The usual remedy for perjury or false statements is a prosecution under applicable statutes. See 18 U.S.C. 1621; 18 U.S.C. 1001. When perjury occurs in a Board proceeding, the agency can refer appropriate cases to the Department of Justice to determine whether criminal prosecution is warranted.[19] Petitioner's rule, however, would require asymmetrical penalties for perjury to be meted out in the Board's own proceedings.

If petitioner's approach were accepted, employers would suffer no sanction from the Board if they lied in an effort to avoid an unfair labor practice finding, while employees who engaged in the same misconduct would automatically suffer the severe consequence of losing a make-whole remedy. In a case such as this, in which both the employee and the employer's repre-

[19] See NLRB Casehandling Manual (Part One) § 10054.5 (June 1989). See also *Multimatic Products, Inc.*, 288 N.L.R.B. 1279, 1279 n.2, 1337 & n.77 (1988) (referring allegation of fraud by union); *Feld & Sons, Inc.*, 263 N.L.R.B. 332, 334, 337 (1982) (case of perjury in the interest of the employer referred and prosecuted); *Marine's Memorial Assoc.*, 261 N.L.R.B. 1357, 1369 (1982) (developing facts so that Board could consider referral). Courts have upheld perjury convictions based on false testimony in Board proceedings. See, *e.g.*, *May* v. *United States*, 280 F.2d 555 (6th Cir. 1960); *Wilson* v. *United States*, 352 F.2d 889 (8th Cir. 1965), cert. denied, 383 U.S. 944 (1966); *Keeble* v. *United States*, 347 F.2d 951 (8th Cir.), cert. denied, 382 U.S. 940 (1965); see also *United States* v. *Krause*, 507 F.2d 113 (5th Cir. 1975) (false statement in violation of 18 U.S.C. 1001); *United States* v. *Di Lapi*, 651 F.2d 140 (2d Cir. 1981) (obstruction of justice), cert. denied, 455 U.S. 938 (1982).

sentatives were found to have testified falsely,[20] petitioner's approach (of penalizing the employee in a manner that rewards the employer) would hardly be "a fair and even-handed punishment for vice." *St. Mary's Honor Center*, 113 S. Ct. at 2754. The effect of petitioner's rule would be not only to penalize the employee (and not the employer) who lies, but also to deny to other employees (who are blameless) meaningful assurance that the employer may not engage in discriminatory discharges.

Petitioner contends (Br. 15) that reinstatement of an employee who testifies falsely will send the message to other employees that "perjury pays." In this case, however, Manso did not profit from his false testimony: the Board awarded him a remedy because it found petitioner's stated reason for discharging Manso to be a pretext for unlawful discrimination; Manso's false testimony was entirely irrelevant to that finding. In these circumstances, a failure to reinstate Manso would send the message to other employees that the employer can discharge an employee for discriminatory reasons with impunity.[21]

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[20] Three of petitioner's officials denied warning Manso that petitioner intended to retaliate against him, see note 2, *supra*, but the ALJ rejected that testimony and found that the warnings were made. Pet. App. B46.

[21] Several courts of appeals, "with little discussion" (Pet. Br. 7), appear to have adopted the position that the Board must deny make-whole relief to an employee who lies before the Board. See *Precision Window Mfg., Inc.* v. *NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992) (considering false testimony and threats); *NLRB* v. *Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975) (per curiam); *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (dictum); *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 185 (8th Cir. 1964); cf. *Alumbaugh Coal Corp.* v. *NLRB*, 635 F.2d 1380, 1385-1386 (8th Cir. 1980) (false claim for unemployment compensation). Whether those courts believed that such a rule is needed to maintain the integrity of the Board's processes or to protect employer interests, they did not attempt to justify the stated limitation on the Board's remedial authority under the standard of *Virginia Elec. & Power Co.* v. *NLRB*, *supra*.

2. Petitioner and its amici argue (Pet. Br. 22-26; Chamber of Commerce *et al.* Amici Br. 17-18) that there is no need for the Board to grant make-whole relief for an unlawfully discharged employee who has lied in a Board proceeding, because there are alternative remedies that can eradicate the effects of the unlawful discharge. The Board may permissibly conclude, however, that those alternative remedies, either alone or in combination, are not adequate replacements for make-whole relief. Cease and desist orders, notice-posting, and the prospect of contempt proceedings are prospective in nature and, while they are essential tools for preventing future violations of the Act, they do not ameliorate the particularized harms that flow from the failure to return an unlawfully discharged employee to his or her former job.

Here, for example, Manso was discharged in retaliation for filing grievances and resorting to the Board. If Manso does not regain his job, petitioner will have accomplished its objective of ridding itself of an employee who asserted contractual and statutory rights. Other employees will understand the risks entailed by such an attempt and will be chilled from engaging in similar activity. That an employer may refrain voluntarily from future violations to avoid "being viewed as a labor outlaw" (Pet. Br. 25) will have little significance if its employees have al-

ready been deterred from exercising their statutory rights.

The other remedies suggested by petitioner serve to enhance, rather than replace, make-whole relief. Visitorial clauses in cases involving an unlawful discharge aid the Board in "secur[ing] compliance with backpay and reinstatement orders by [precluding] the refusal of employers to permit access to payroll and other records." *Cherokee Marine Terminal*, 287 N.L.R.B. 1080, 1081 (1988). Expungement orders are part of the Board's effort to make a reinstated employee whole. By removing unlawful disciplinary actions from his permanent record, the Board seeks to free him from the adverse effects of discrimination after being reinstated. *Sterling Sugars, Inc.*, 261 N.L.R.B. 472 (1982). Finally, as petitioner notes (Br. 25-26), the Board assesses litigation expenses against a respondent only where its defenses in the unfair labor practice proceeding were "frivolous." *Heck's, Inc.*, 215 N.L.R.B. 765, 768 (1974).

3. Amici Chamber of Commerce *et al.* argue (Br. 5, 8-9, 13) that it offends national labor policy to require an employer to retain an untruthful employee, because trust is fundamental to the employer-employee relationship. As the Board made clear in its decision here (Pet. App. B18 n.13), an employer is entitled to discharge an employee for dishonesty.[22]

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[22] Section 10(c) precludes the Board from ordering reinstatement or the payment of backpay to any individual who "was suspended or discharged for cause." 29 U.S.C. 160(c). That provision is not a check on the Board's remedial authority once it has found an unfair labor practice, however. As the Court explained in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964):

> An employer who has committed an unfair labor practice by discharging an employee out of anti-union animus, however, is not in the same position as an employer who fires an employee for cause. The Board's authority to remedy the unfair labor practice requires it to consider not only the impact of reinstatement on the employer, but also the impact of the discriminatory firing on the workforce as a whole and the role of reinstatement in removing the threat of retaliation for protected activity.[23]
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> The Board's policy is not to guarantee reinstatement to an unlawfully discharged employee who has testified falsely; the employer has the right to show that the employee's misconduct renders the employee unfit for further employment or jeopardizes the efficiency of the employer's operations. While that is a
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> The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct. There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.

Id. at 217; see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 401 n.6.

[23] In passing, petitioner suggests (Pet. 18-19 n.11) that to compel it to reemploy "someone as undeserving as Mr. Manso is in effect a penalty." While it is true that the Act does not authorize penalties, *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10 (1940), this Court long ago recognized the futility of using labels to analyze particular reinstatement orders designed to counteract unlawful activity. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 348. Because the Board permits the employer to avoid reinstatement of an employee who is demonstrably unfit for service, its reinstatement orders cannot be characterized as penal.

heavier burden than the employer bears to justify a discharge for cause, see *Owens Illinois*, 290 N.L.R.B. at 1193 n.5, it is warranted by the fact that, when the employer has initially retaliated against the employee for exercising statutorily protected rights, reinstatement of that employee is presumptively necessary to eradicate the effects of the unfair labor practice on the workforce.[24]

Amicus ATA takes a different tack, contending (Br. 14) that the purposes of the Act "cannot conceivably be advanced by forcing upon the employer a worker whom the employer would have ample grounds to fire because of his post-discharge false testimony against the employer." An employer may not circumvent the Board's remedial authority, however, by arguing that the employee's misconduct during the Board hearing constitutes "cause" for dis-

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[24] As petitioner notes (Br. 17-18), several cases have held that, despite an unfair labor practice, employee misconduct on the job established unfitness for further employment. See *NLRB* v. *Apico Inns of Cal., Inc.*, 512 F.2d 1171, 1173 (9th Cir. 1975) (bartender made profane remarks about his supervisor in front of customers and fellow employees, sexually harassed other employees, made lewd remarks and gestures to customers, and failed to fill drink requests); *NLRB* v. *Commonwealth Foods, Inc.*, 506 F.2d 1065, 1068 (4th Cir. 1974) (employees who admitted stealing from their employer were not entitled to reinstatement); *NLRB* v. *Breitling*, 378 F.2d 663, 664 (10th Cir. 1967) (same); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77, 82-84 (5th Cir. 1966) (same). Whether or not those cases are correctly decided on their facts, the Board agrees with the general principle that some forms of misconduct are incompatible with reinstatement; what the Board rejects is the proposition that any misconduct justifies the denial of reinstatement of an employee who has been unlawfully discharged.

charge, after the Board itself has determined that the need to sanction that misconduct is outweighed by the need to remedy the *employer's* unlawful conduct. The employer is not required to retain the reinstated employee forever; "[i]f the reinstated employee does not effectively perform, he may, of course, be discharged for cause." *Golden State Bottling Co.* v. *NLRB*, 414 U.S. at 185. But the employer may not rely on pre-reinstatement conduct as a basis for termination, when the Board has already considered and rejected that ground.[25]

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[25] Petitioner relies (Br. 31-33) on cases decided under Title VII of the Civil Rights Act of 1964 addressing the relevance to a discrimination claim of after-acquired evidence of a lawful basis for dismissal. See *Milligan-Jensen* v. *Michigan Technological University*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991 (1993) (No. 92-1214), cert. dismissed pursuant to Sup. Ct. R. 46.1 (Aug. 10, 1993). Those Title VII cases, however, are not relevant to petitioner's claim that a rule barring make-whole relief to charging parties who lie is required to protect the integrity of the Board's processes. As Amicus ATA recognizes (Br. 15 n.4), the policies underlying the Board's remedial powers differ from those at issue in Title VII. Moreover, because petitioner did not contend or establish that it would not have hired, or would have discharged, an employee found to have given false testimony, this case presents no issue as to whether the Board would bar reinstatement when the employer proves that the employee engaged in post-discharge misconduct that would result in the discharge of any similarly situated employee. Compare *Service Garage, Inc.*, 256 N.L.R.B. at 931 (Board has held that "a discriminatee's right to reinstatement and backpay will be forfeited if a respondent affirmatively proves that it would not have hired the employee but for its reliance on application information whose falsity was discovered subsequent to the employee's unlawful discharge"); *John Cueno, Inc.*, 298 N.L.R.B. 856, 856-857 & n.7 (1990) (limiting the denial of backpay to

In sum, petitioner's basic contention is that the Board is always required to deny make-whole relief to an employee who has given false testimony in Board proceedings. As this Court long ago noted, in affirming the Board's discretion in its decisions to award or withhold reinstatement,

> [b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp., 313 U.S. at 194. In light of that principle, petitioner's request for a blanket rule to govern the Board's remedial discretion in the context here should be rejected.

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the date when the employer discovered the false application information).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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